COURT OF APPEALS
DECISION
DATED AND FILED

February 25, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2702-CR **Cir. Ct. No. 01-CT-159**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS G. LARSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for St. Croix County: SCOTT R. NEEDHAM, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] Thomas Larson appeals an order denying his motion to dismiss the complaint against him as a sanction for the State's failure to collect evidence, as well as the resulting judgment of conviction for operating a

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

motor vehicle while intoxicated, second offense, contrary to WIS. STAT. § 346.63(1)(a). Because the State is not required to collect every piece of potentially exculpatory evidence and because the evidence Larson sought was neither potentially nor apparently exculpatory, the judgment and order are affirmed.

Background

¶2 St. Croix County sheriff's deputy Kristopher Stewart was dispatched to a one-car accident that had been reported by a passerby. Stewart arrived at the scene within five minutes of the dispatch. The accident was reported at roughly the time of its occurrence. When Stewart arrived, several bystanders were at the scene. He approached the group and asked where the driver was. The bystanders pointed to Larson. Stewart approached Larson and asked what happened. Larson admitted he had been driving and was alone in the car, and Stewart noticed several indicia of intoxication.

¶3 Stewart spoke with several bystanders, including the person who actually saw the accident. This witness indicated Larson was the driver and only occupant. However, Stewart neither collected the names of the witness or bystanders nor obtained a formal statement from any of them because Larson had admitted everything the witness had stated.

¶4 Larson's preliminary breath test revealed a blood-alcohol concentration of .24%. He was arrested and charged with OWI, second offense. Larson filed a motion to suppress evidence for lack of probable cause to stop and question and a motion to dismiss on the grounds that "the State has destroyed, failed to preserve or failed to furnish" potentially exculpatory evidence by Stewart's failure to gather at least the bystanders' names. Both motions were

denied, and Larson pled no contest to the OWI charge. Larson now appeals the order denying the motion to dismiss and the judgment of conviction.

Discussion

¶5 This appeal involves the application of a constitutional standard to police conduct. Whether the trial court erred as a matter of law in applying the constitutional standard is a question of constitutional fact we review de novo. ***State v. Greenwold***, 189 Wis. 2d 59, 66, 525 N.W.2d 294 (Ct. App. 1994).

¶6 This court has previously ruled that the State is not required to collect all evidence that might possibly turn out to be exculpatory. ***State v. Smith***, 125 Wis. 2d 111, 130, 370 N.W.2d 827 (Ct. App. 1985), *rev'd on other grounds,* 131 Wis. 2d 220, 388 N.W.2d 601 (1986). On that ground alone, we could affirm. Larson, however, characterizes this as a case where the State has destroyed or failed to preserve evidence it already had. Even under the analysis required for that scenario, Larson's argument is unavailing.

¶7 Deciding a case where the State allegedly destroys evidence before trial involves "what might loosely be called the area of constitutionally guaranteed access to evidence." ***Arizona v. Youngblood***, 488 U.S. 51, 55 (1988) (citation omitted). In Wisconsin, we have a line of jurisprudence on this topic, culminating with our current standard. A defendant's due process rights are violated by the destruction of or failure to preserve evidence "(1) if the evidence destroyed was apparently exculpatory and of such a nature that the defendant would be unable to obtain comparable evidence by other reasonable means; or (2) if the evidence was potentially exculpatory and was destroyed in bad faith." ***State v. Parker***, 2002 WI App 159, ¶14, 256 Wis. 2d 154, 647 N.W.2d 430.

¶8 Larson claims the witness and bystander statements were "potentially exculpable evidence because they either saw the accident or saw the aftermath, with the driver exiting the vehicle." Moreover, he claims "witnesses from the scene could have provided exculpable information if they were unable to convincingly identify Larson as the driver or if they identified someone else as the driver. Reasonable doubt could be established."

¶9 Larson's problem, however, is that under the first prong of the test, the exculpatory value of the evidence must be apparent before it is destroyed or, in this case, not collected. *See* ***California v. Trombetta***, 467 U.S. 479, 489 (1984). Stewart testified that when he approached the group of bystanders, they indicated Larson was the driver. Larson also admitted he was the only person in the car. It was hardly apparent to Stewart that any of the witnesses would have or could have identified anyone else as the driver or that they might experience a memory failure when they were called to testify. It was also hardly apparent that Larson would call these witnesses to impeach his own confession.[2]

¶10 Under the second prong, evidence need only be potentially exculpatory. ***Parker***, 2002 WI App 159 at ¶14. However, the defendant must show that it was destroyed in bad faith. ***Id.*** Even assuming every witness might potentially fail to recall or identify Larson, his own confession would still stand against him. Larson also has not alleged that Stewart's actions were made in bad faith, nor could he so prove.

[2] We note that Larson has not challenged the validity of his confession.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.